UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

E. A. RENFROE & COMPANY, INC.	**)**	
	)	
and	**)**	**Case 10-CA-171072**
	)	
KIMANI ADAMS	**)**	

RESPONDENT'S RESPONSE TO NOTICE TO SHOW CAUSE

K. Bryance Metheny
E. Travis Ramey

Attorneys for Respondent
E. A. Renfroe & Company, Inc.

OF COUNSEL:

BURR & FORMAN LLP
420 North 20th Street
3400 Wells Fargo Tower
Birmingham, Alabama 35203
Telephone: 205-251-3000
Facsimile: 205-458-5100
bmetheny@burr.com
tramey@burr.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

A. Statement of the Facts and Procedural Background 2

II. DISCUSSION 5

A. The Agreement is Lawful as a Matter of Law 5

1. Legal Standard 5

2. The Agreement Is Lawful Because It Exempts Board Charges From Its Arbitration Mandate. 8

3. The Agreement Is Lawful Because The Business Justifications For The Agreement Outweigh Its Potential Impact On Protected Activity. 11

B. Adams Was Not Constructively Discharged As A Matter of Law 12

III. CONCLUSION 13

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

Cases: Page(s)

14 Penn Plaza LLC v. Pyett,
556 U.S. 247 (2009) 10

Am Prop. Holding Corp.,
365 NLRB No. 162 (Dec. 15, 2017) 5

Armstrong v. Collier,
536 F.2d 72 (5th Cir. 1976) 5

Boeing Co.,
365 NLRB No. 154 (Dec. 14, 2017) ..... *passim*

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 11

CompuCredit Corp. v. Greenwood,
565 U.S. 95 (2012) 11

Crown Cork & Seal Co. v. Int'l Ass'n of Machinists & Aerospace Workers,
501 F.3d 912 (8th Cir. 2007) 5

Dean Witter Reynolds, Inc. v. Byrd,
470 U.S. 213 (1985) 11

Decible Prods,
267 NLRB 1053 (1983) 5

Drewery v. Gen. Elec. Consumer & Indus.,
No. 1:06-CV-220, 2006 WL 2228963 (N.D. Ind. Aug. 3, 2006) 12

Epic Sys. Corp. v. Lewis,
138 S. Ct. 1612 (2018) 1, 4, 11, 12

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 11

In re Mediaone of Greater Fla., Inc.,
340 NLRB 277 (2003) 8

Jacobs v. Schiffer,
204 F.3d 259 (D.C. Cir. 2000) 5

Cases: Page(s)

Judd v. Haley,
250 F.3d 1308 (11th Cir. 2001) 5

LaFayette Park Hotel,
326 NLRB 824 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999),
overruled on other grounds sub nom. Boeing Co.,
365 NLRB No. 154 (Dec. 14, 2017) 7, 8

Lincoln E. Mgmt. Corp.,
364 NLRB No. 16 (May 31, 2016) 9

Lutheran Heritage Village-Livonia,
343 NLRB 646 (2004), *overruled sub nom.*
Boeing Co., 365 NLRB No. 154 (Dec. 14, 2017) 6

Marmet Health Care Ctr., Inc. v. Brown,
565 U.S. 530 (2012) 11

Md. Dep't of Human Res. v. Dep't of Health & Human Servs.,
854 F.2d 40 (4th Cir. 1988) 5

Metro. Edison Co. v. NLRB,
460 U.S. 693 (1983) 10

Murphy Oil USA, Inc.,
361 NLRB 774 (2014*), enf. denied in relevant part*,
Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015),
overruled sub nom. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) 4

Nitro-Lift Techs., L.L.C. v. Howard,
568 U.S. 17 (2012) 11

O'Charley's Inc.,
28 NLRB AMR 38091, 2001 WL 36368393 (Apr. 16, 2001) 13

Perry v. Bartlett,
231 F.3d 155 (4th Cir. 2000) 5

Ralph's Grocery Co.,
363 NLRB No. 128 (Feb. 23, 2016) 9

Securitas Sec. Servs. USA, Inc.,
363 NLRB No. 182 (May 11, 2016) 9

Cases: Page(s)

SolarCity Corp.,
363 NLRB No. 83 (Dec. 22, 2015) 9

S.T.A.R., Inc.,
347 NLRB 82 (2006) 8

U-Haul Co. of Cal.,
347 NLRB 375 (2006) 9

Other:

Memorandum GC 18-04, *Guidance on Handbook Rules Post-Boeing*,
2018 WL 2761555 (N.L.R.B.G.C. June 6, 2018) 6, 7

Respondent E. A. Renfroe & Company, Inc. ("RENFROE") files this Response to the Notice to Show Cause to the Board's Decision, Order, and Notice to Show Cause issued on October 4, 2018.

I. INTRODUCTION

The National Labor Relations Board ("Board") -- overruling the administrative law judge and dismissing the underlying complaint allegation -- found lawful RENFROE's arbitration agreement that requires employees to waive their right to pursue class or collective actions involving employment-related claims. The Board based its decision on the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). The Board, however, requested the parties' position on the two remaining issues: (1) whether the Board can resolve without remand the complaint allegation that RENFROE's arbitration agreement interfered with employees' ability to access the Board pursuant to the work rule test from *Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017), and (2) even if the interference claim is remanded, whether the Board can resolve Charging Party Kimani Adams' ("Adams") constructive discharge claim.

Remand is unnecessary. The two remaining allegations are due to be dismissed as a matter of law and remand would be inefficient. The questions presented are purely legal ones, the record is fully developed based on stipulated facts, and further fact-finding is particularly unnecessary after the Board's decision that partially resolves this case. As a matter of law, the challenged arbitration agreement is lawful under the *Boeing* Test: (1) it does not explicitly prohibit filing Board charges and expressly excludes from arbitration any claims "that, as a matter of law, the Parties cannot agree to arbitrate," which would necessarily include filing Board charges, and (2) regardless, its substantial business justifications outweigh any potential impact on protected activity. Also, as a matter of law Adams was not constructively discharged because RENFROE was free to condition continued assignments on Adams signing the *lawful* arbitration agreement.

A. Statement of the Facts and Procedural Background

The parties stipulated to the straightforward facts. RENFROE employs project employees who provide temporary support services to insurance companies during times of disaster or claims overload. (Jt. Ex. 1 at ¶¶ 4, 6.) RENFROE hired Charging Party Kimani Adams as a project employee in 2012 and gave her assignments as a project employee in Georgia and Texas. (*Id.* at ¶ 7.) In September 2014, RENFROE deployed her to work on a project assignment in Georgia that was expected to last until June 24, 2016. (Id. at ¶ 8.)

On February 17, 2016, RENFROE electronically distributed a copy of a Mutual Agreement to Arbitrate Employment-Related Disputes ("Agreement") to its project employees, including Adams. (Jt. Ex. 3.) Project Employees were required to execute the Agreement to remain eligible for deployment. (Jt. Ex. 1 at ¶ 10.) The Agreement provides in relevant part:

> 3. Covered Claims. The Parties are mutually obligated to arbitrate all Claims arising out of or relating to their employment relationship. This Agreement covers all Claims in a federal, state, or local court or agency under applicable federal, state, or local laws, arising out of or relating to Employee's employment with Employer, performance of work for the Employer's clients, or the termination of Employee's employment…
>
> 4. Claims Not Covered. This Agreement does not cover claims for workers' compensation, unemployment compensation benefits, or any other claims that, as a matter of law, the Parties cannot agree to arbitrate. The Parties agree that either party shall be entitled to seek injunctive or other equitable relief in a court of competent jurisdiction for any alleged breach of the Parties' Employment Agreement, enjoining any such breach. Unless otherwise agreed by the Parties, however, any claim for monetary damages associated with such alleged breach must be pursued by the parties through binding arbitration.

(Jt. Ex. 3 at ¶¶ 3-4.)

On February 22, 2016, Adams sent an email to RENFROE indicating that she wished to renegotiate five sections of the Agreement. (Jt. Ex. 4 at 1.) Adams' requested changes did not relate to the filing of complaints with the Board. (*See id.*) RENFROE declined to modify the

Agreement in the manner Adams requested. (*See id*. at 2.) Adams and RENFROE exchanged additional emails regarding potential modifications of the Agreement, which culminated in Adams informing RENFROE that she refused to sign the Agreement. (*See id.* at 3–9.) Based on that refusal, RENFROE released Adams from her project assignment. (Jt. Ex. 1 at ¶ 12.)

About a month later, on March 29, 2016, RENFROE issued to all project employees who had not already signed the Agreement, including Adams, a Revised Project Employee Agreement ("Revised Agreement") that explicitly stated that the mutual agreement to arbitrate did not apply to the filing of complaints with the Board. (Jt. Ex. 1 at ¶ 14; Jt. Ex. 5 at ¶ 18.)[1]

On April 5, 2016, RENFROE sent an email to Adams informing her that: (1) it had revised the Agreement; and (2) she would be eligible for future deployments if she signed the Revised Agreement. (*See* Jt. Ex. 1 at ¶ 15; Jt. Ex. 7.) Adams has not signed the Revised Agreement. (*See* Jt. Ex. 1 at ¶ 16.) Accordingly, RENFROE has not assigned Adams to another project. (*Id.* at 13.)

On March 4, 2016, Adams filed an unfair labor practice charge against RENFROE. (GC Ex. 1(a).) On April 26, 2016, the Regional Director for Region 10 issued a Complaint and Notice of Hearing, (GC Ex. 1(c)), alleging in part that RENFROE had violated the National Labor Relations Act ("Act" or NLRA") by maintaining an arbitration agreement that precluded employees from filing unfair labor practice charges with the Board since at least February 17, 2016 and until March 29, 2016 -- the date RENFROE issued the Revised Agreement – and conditioning further assignment on acceptance of the Revised Agreement. (*See id.* at ¶¶ 4(f), 5(a).)

On June 13, 2016, Administrative Law Judge Keltner Locke ("ALJ") conducted the hearing on the Complaint via telephone. At that hearing, the General Counsel offered the formal

[1] To those project employees who had already signed the Agreement, RENFROE issued a "Clarification" stating that nothing in the agreement should be interpreted to preclude the filing of complaints with the Board. (See Jt. Ex. 1 at ¶ 14; Jt. Ex. 6.)

documents as exhibits, (GC Exs. 1(a)–(f)), and they were admitted. The parties also offered seven joint exhibits, (Jt. Exs. 1–7), which included stipulated facts, and they were admitted.

On August 17, 2016, the ALJ issued his decision. (Order (Aug. 17, 2016).) In that decision, the ALJ concluded that (1) the Agreement violated Section 8(a)(1) of the Act because RENFROE employees reasonably could construe the Agreement to preclude the exercise of conduct protected by Section 7 of the Act based on application of the "reasonably construe" standard from *Lutheran Heritage Village-Livonia,* (*id.* at 33–34), and (2) RENFROE violated Section 8(a)(1) of the Act by constructively terminating Adams for refusing to sign the Agreement, (*id.* at 36–37). RENFROE filed Exceptions on October 5, 2016. (Resp't E. A. Renfroe & Co., Inc's. Exceptions to Admin. Law Judge Keltner Locke's Order (Oct. 5, 2016).)

On October 4, 2018, the Board issued its Order. (Decision, Order, & Notice to Show Cause (Oct. 4, 2018) ("Order (Oct. 4, 2018)".) The Board concluded, in light of the Supreme Court's decision in *Epic Systems*,[2] which overruled the Board's holding in *Murphy Oil USA, Inc.*,[3] the complaint allegation that the mandatory arbitration agreement was unlawful based on *Murphy Oil* must be dismissed. In so doing, the Board stated it was not necessary to address any other issues raised by Respondent's exceptions[4] except for the only two remaining issues. Specifically, the Board requested the parties' position as to whether it should remand the issue of whether the arbitration agreement interfered with employees' ability to access the Board in light of the Board's decision in *Boeing Co.,* 365 NLRB No. 154 (Dec. 14, 2017). The Board also requested the parties'

[2] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

[3] *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), *enf. denied in relevant part, Murphy Oil USA, Inc. v. NLRB,* 808 F.3d 1013 (5th Cir. 2015), *overruled sub nom. Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

[4] Order (Oct. 4, 2018) at n.1.

position as to whether a remand would affect the Board's ability to resolve the remaining complaint allegation that Charging Party Kimani Adams was unlawfully constructively discharged.

II. DISCUSSION

The Board, as with appellate Courts, may resolve purely legal questions without remand where further fact-finding is unnecessary.[5] Here, the facts are undisputed, no further fact-finding is necessary and the Board need not remand and can dismiss the complaint because, as a matter of law, (1) the Agreement is lawful, and (2) Adams was not constructively discharged. If, however, the Board remands the issue of the lawfulness of the Agreement it will necessarily have to remand the discharge claim because they are inextricably connected.

A. The Agreement is Lawful as a Matter of Law

1. Legal Standard

The Board's Order held the Agreement's lawfulness -- whether it interfered with employees' ability to access the Board in violation of Section 8(a)(1) of the Act -- required the application of

[5] *Am Prop. Holding Corp.*, 365 NLRB No. 162, at *3 (Dec. 15, 2017) ("[W]e may determine (on the present record, without a remand) whether PBS individually was a successor employer; and (2) under established legal principles, PBS was indeed a successor with a duty to bargain with the Union."); *Decible Prod*s, 267 NLRB 1053, 1054 (1983) (refusing to remand and stating "we find that as a matter of law there is nothing raised in Respondent's objections warranting either a hearing or an examination of the investigatory materials compiled by the Regional Director"); *see also Crown Cork & Seal Co. v. Int'l Ass'n of Machinists & Aerospace Workers*, 501 F.3d 912, 916 (8th Cir. 2007) ("We believe remand would be inefficient and unnecessary. The parties submitted a joint stipulation to the material facts, the record is complete, and our review of the legal conclusions is de novo in any event."); *Judd v. Haley*, 250 F.3d 1308, 1318-19 (11th Cir. 2001) (declining to remand when record developed by magistrate judge was adequate to resolve issue); *Perry v. Bartlett*, 231 F.3d 155, 160 (4th Cir. 2000) ("[B]ecause the question is purely a legal one, a remand is unnecessary . . . ."); *Jacobs v. Schiffer*, 204 F.3d 259, 264 (D.C. Cir. 2000) ("Because the question of whether the Department's position was substantially justified can be answered as a matter of law, a remand is unnecessary . . . ."); *Md. Dep't of Human Res. v. Dep't of Health & Human Servs.*, 854 F.2d 40, 41 (4th Cir. 1988) ("We see no need to remand since we decide only an issue of law."); *Armstrong v. Collier*, 536 F.2d 72, 77 (5th Cir. 1976) ("[R]emand is not required if a complete understanding of the issues may be had without the aid of separate findings . . . ." (citation omitted)).

the new *Boeing* Test and not the overturned "reasonably construe" standard from *Lutheran Heritage Village-Livonia*,[6], on which the ALJ relied. The *Boeing* Test balances the challenged policy's potential impact on protected rights with the policy's business justifications. The *Boeing* Test provides that facially neutral policies generally may be sorted into one of three categories:

> Category 1. lawful rules either because (i) when reasonably interpreted, they do not interfere with the exercise of protected rights or (ii) because the potential adverse impact on protected rights is outweighed by justifications associated with the rule;
>
> Category 2. rules which warrant individualized scrutiny (a case-by-case basis) as to whether the specific rule would prohibit or interfere with NLRA rights, and, if so, whether the impact is outweighed by business justifications; and
>
> Category 3. rules which would be unlawful as they prohibit or limit NLRA rights, and the impact on NLRA rights is not outweighed by business justifications. [7]

Under the *Boeing* Test, the Board must first determine whether the facially neutral policy *when reasonably interpreted* could potentially interfere with protected rights. If not, the policy is Category 1 and presumptively lawful.[8] In making such a determination, "[a]mbiguities in rules are no longer interpreted against the drafter,"[9] "generalized provisions should not be interpreted as

---

[6] *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), *overruled sub nom. Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017).

[7] *Boeing Co.*, 365 NLRB No. 154, at 16.

[8] *Id*. at 15-16.

[9] Memorandum GC 18-04, *Guidance on Handbook Rules Post-Boeing*, 2018 WL 2761555 (N.L.R.B.G.C. June 6, 2018).

banning all activity that could conceivably be included"[10] and the analysis must be viewed from any objectively reasonable employee who is "*aware of his legal rights.*"[11]

Second, if a policy potentially interferes with protected rights (under either Category 1, 2, or 3 above), the policy's legitimate business justifications are weighed against the policy's, potential impact on protected rights. In analyzing the potential impact, "the Board must recognize those instances where the risk of intruding on NLRA rights is comparatively slight."[12] Further, the Board should consider the important business justifications at stake, and, thus, "may distinguish between substantial justifications -- those that have direct, immediate relevance to employees or the business -- and others that might be regarded as having more peripheral importance."[13]

Here, under the *Boeing* Test, the Agreement when reasonably interpreted does not interfere with protected rights -- employees' access to the Board is not impeded because the Agreement plainly excludes claims that the "Parties cannot agree to arbitrate" which encompasses filing Board charges. Regardless, even if the Board were to conclude the Agreement could be interpreted to potentially interfere with access to the Board and a balancing test must be used, compelling business justifications for the Agreement -- that have "direct, immediate relevance" -- outweigh any minimal impact on protected rights.

---

[10] *Id.*; *see also Boeing Co.*, 365 NLRB No. 154, at *10 n.43 ("[T]the Board has consistently misapplied an evidentiary principle that ambiguity in general work rule language must be construed against the drafter."); *Lafayette Park Hotel*, 326 NLRB 824, 829-30 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999), *overruled on other grounds sub nom. Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017).

[11] *Boeing Co.*, 365 NLRB No. 154, at *4 n.14, *17 n.80.

[12] *Id.* at *16.

[13] *Id.*

2. The Agreement Is Lawful Because It Exempts Board Charges From Its Arbitration Mandate.

The Agreement does not explicitly prohibit employees from filing Board charges and expressly excludes from arbitration any claims "that, as a matter of law, the Parties cannot agree to arbitrate," which would *necessarily* include filing Board charges. Accordingly, under the *Boeing* Test, the Agreement could not be interpreted to interfere with employees' access to the Board, or any protected rights, and is a lawful Category 1 policy.

As an initial matter, the Agreement is facially neutral because it does not explicitly prohibit filing Board charges. Indeed, the ALJ concluded so, stating "[t]he [Agreement]'s provisions in question do not explicitly prohibit recourse to the Board."[14] No Exceptions were taken to this finding.[15]

Because the Agreement is facially neutral, the Agreement's lawfulness must be analyzed under the *Boeing* Test as the Board's Order requires.[16] In such analysis, the Agreement must be read as a whole.[17] Further, particular phrases cannot be isolated or construed in a vacuum.[18] Phrases also should not be presumed to have unlawful interference with employees' rights and ambiguities are not interpreted against the drafter.[19]

---

[14] Order (Aug. 17, 2016), at 36.

[15] *See* Resp't E. A. Renfroe & Co., Inc.'s Exceptions to Admin. Law Judge Keltner Locke's Order (Oct. 5, 2016).

[16] Order (Oct. 4, 2018) at 2.

[17] *See e.g., In re Mediaone of Greater Fla., Inc.*, 340 NLRB 277, 279 (2003).

[18] *See S.T.A.R., Inc.*, 347 NLRB 82, 83 n.3 (2006) ("When determining a rule's reasonable constructions, the Board must refrain from reading particular phrases in isolation and must not presume improper interference with employee rights.").

[19] *Lafayette Park Hotel*, 326 NLRB at 825, 829-30 ("Rather, any arguable ambiguity arises only through parsing the language of the rule, viewing the phrase . . . in isolation, and attributing

The Agreement provides "the parties are mutually obligated to arbitrate all Claims arising out of or relating to their employment relationship" but plainly excludes any claims "that, as a matter of law, the Parties cannot agree to arbitrate" (hereinafter referred to as "the exclusion").[20] The exclusion is written in plain English. The exclusion is contained in a separately numbered paragraph dedicated solely to delineating the types of actions not covered by arbitration, titled "Claims Not Covered." The exclusion is the very first sentence of that standalone paragraph. The "claims not covered" section immediately follows the "claims covered" section. The exclusion is absolute. There is no ambiguity.

The exclusion plainly covers the right to file Board charges. The Board has consistently held that, as a matter of law, an employer cannot require an employee to forego the right to file Board charges through mandatory arbitration.[21] A provision, thus, excluding from arbitration claims "that, as a matter of law, the Parties cannot agree to arbitrate" would *necessarily* encompass filing charges with the Board.

Under the *Boeing* Test, the analysis of the exclusion considers an objectively reasonable employee who is "*aware of his legal rights.*"[22] An employee "aware of his legal rights" would, as

---

to the Respondent an intent to interfere with employee rights. We are unwilling to place such a strained construction on the language . . . .").

[20] Jt. Ex. 3 at ¶¶ 3-4.

[21] *See e.g., U-Haul Co. of Cal.*, 347 NLRB 375, 377 (2006) (mandatory arbitration agreement precluding the filing of Board charges unlawful); *see also Lincoln E. Mgmt. Corp.*, 364 NLRB No. 16, at *2 (May 31, 2016) (same); *Securitas Sec. Servs. USA, Inc.*, 363 NLRB No. 182 (May 11, 2016) (same)*; Ralph's Grocery Co.*, 363 NLRB No. 128 (Feb. 23, 2016) (same); *SolarCity Corp*., 363 NLRB No. 83, at *4 (Dec. 22, 2015) (same). Of course, those cases have been overruled because they rely on the "reasonably construe" *Lutheran Heritage* standard but they still stand for the proposition that employers cannot preclude employees from filing Board charges.

[22] *Boeing Co.*, 365 NLRB No. 154, at *4 n.14, *17 n.80 (emphasis added).

discussed above, know he or she could file Board charges and that right could not be waived. Adams herself clearly knew she could file a Board charge, because she actually filed a Board charge.

Further, even if an employee was not "aware of his legal rights," the employee could not interpret the Agreement to say something it does not. A reading that the exclusion does not cover filing Board charges would be untenable and contradictory. Indeed, the Supreme Court has stated that a waiver of statutorily protected rights (for example, the right to file Board charges) must be explicit, "clear and unmistakable."[23] Here, the Agreement does not waive the right to file Board charges -- indeed, to the contrary, the Agreement permits the filing of Board charges -- and certainly does not contain a "clear and unmistakable" waiver. There is also no evidence in the record, or otherwise, indicating that Adams or other RENFROE employees have declined to file charges with the Board or other governmental agencies or that they believed they were unable to do so because the Agreement precludes it. Indeed, Adams *did* file a Board charge. An express and explicit NLRB carve-out in the Agreement to file Board charges is not required and would be unnecessary as it simply would repetitively state that which already exists. Regardless, as the Board stressed in *Boeing Co.*, "linguistic perfection" is not required in drafting policies.[24]

Put simply, the Agreement could not be understood to prohibit filing Board charges because the Agreement permits the filing of Board charges. The Agreement is, thus, a facially lawful Category 1 policy.

---

[23] *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 254-55 (2009); *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

[24] *Boeing Co.*, 365 NLRB No. 154, at *10 nn.41 & 43.

3. The Agreement Is Lawful Because The Business Justifications For The Agreement Outweigh Its Potential Impact On Protected Activity.

Even assuming the Agreement could be reasonably interpreted to preclude employees from filing Board charges (it could not), the Board must consider RENFROE's business justifications under the *Boeing* Test's Category 1, 2, or 3 analysis. The Agreement is lawful because RENFROE's substantial business justifications for the Agreement outweigh any potential impact the Agreement may have on protected activity.

The Agreement's arbitration requirement has a "direct, immediate relevance to employees [and] the business."[25] To start, the Federal Arbitration Act ("FAA") has declared a strong and emphatic national policy favoring arbitration[26] and the Supreme Court has regularly and consistently enforced the FAA's broad reach, particularly in the employment context.[27] Indeed, Courts have regularly stated arbitration agreements are to be "rigorously enforced."[28] Further, the Agreement furthers weighty interests for both RENFROE and employees by ensuring disputes are fairly and expeditiously resolved. Litigating employment disputes in arbitration is widely recognized as an expedient, cost-effective means to resolve employment disputes which are,

---

[25] *Id.* at *16.

[26] *See, e.g., Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 20 (2012); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012).

[27] *See, e.g., Epic Sys. Corp.*, 138 S. Ct. 1612; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (discussing Age Discrimination in Employment Act); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (state court employment discrimination action).

[28] *Epic Sys. Corp.*, 138 S. Ct. at 1621; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218-21 (1985).

regrettably, a common occurrence in the modern workplace.[29] The business justifications for the Agreement are, thus, substantial.

In contrast, the Agreement's potential impact on protected activity is minimal. The NLRA does not "even hint at a wish to displace the Arbitration Act."[30] While RENFROE recognizes employees' right to utilize Board processes is important, the Agreement's plain language excludes Board charges from its mandates. Employees would not reasonably read the Agreement to interfere with the exercise of NLRA rights. Thus, the likelihood that the Agreement would impact protected activity is minimal, at best.

The Agreement furthers substantial business interests recognized by Congress and the Courts that is relevant to both RENFROE and its employees. The potential impact on protected activity, on the other hand, is minimal as the Agreement's plain language expressly excludes Board charges from its mandates and the NLRA does not displace the FAA. Accordingly, the Agreement's business justifications outweigh its potential impact on protected activity, and the Agreement does not violate the Act.

B. Adams Was Not Constructively Discharged As A Matter of Law

The Board's Order stated the response "should address whether a remand would affect the Board's ability to resolve the remaining complaint allegation that Charging Party Kimani Adams was unlawfully constructively discharged, including whether it should be severed and retained or

---

[29] *See, e.g., Drewery v. Gen. Elec. Consumer & Indus.*, No. 1:06-CV-220, 2006 WL 2228963, at *6 (N.D. Ind. Aug. 3, 2006) ("The federal courts, including the Supreme Court, have come to embrace and enforce arbitration agreements over the past few decades since they often offer a much more cost-effective and expedient way to resolve disputes and claims, including civil rights claims.")

[30] *Epic Sys. Corp.*, 138 S. Ct. at 1624.

instead included in the remand."[31] Adams' constructive discharge claim turns entirely on the Agreement's lawfulness. If the Agreement is lawful for the reasons set forth above, RENFROE was plainly free to condition continued assignments on Adams signing the Agreement, and Adams' discharge claim must fail.[32] RENFROE incorporates herein all arguments it raised in its Exceptions.[33] However, if the Board remands the issue of whether the Agreement is lawful it should also remand the discharge claim as they are inextricably intertwined.

III. CONCLUSION

For the foregoing reasons, the Board should find the Agreement is lawful and that Adams was not constructively discharged and, thus, dismiss the remaining complaint allegations and the complaint in its entirety, as the other allegations have been dismissed. In the alternative, if the issue of the lawfulness of the Agreement is remanded the discharge claim should also be remanded, but all other allegations not remanded should be dismissed.

s/ K. Bryance Metheny
K. Bryance Metheny
E. Travis Ramey

Attorneys for Respondent
E. A. Renfroe & Company, Inc.

[31] Order (Oct. 4, 2018) at 3.

[32] *See generally O'Charley's Inc*, 28 NLRB AMR 38091, 2001 WL 36368393 (Apr. 16, 2001).

[33] *See* E. A. Renfroe's Br. in Supp. of Exceptions to Admin. Law Judge's Decision (Oct. 5, 2016).

OF COUNSEL:

BURR & FORMAN LLP
420 North 20th Street
3400 Wells Fargo Tower
Birmingham, Alabama 35203
Telephone: 205-251-3000
Facsimile: 205-458-5100
bmetheny@burr.com
tramey@burr.com

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2018, I filed Respondent's Response to Notice to Show Cause Order with the NLRB Executive Secretary via the Board's electronic filing system, and served a copy of the foregoing by electronic mail upon the following:

Claude T. Harrell, Jr., Regional Director
National Labor Relations Board, Region 10
233 Peachtree Street, NE
1000 Harris Tower
Atlanta, Georgia 30303
Email: claude.harrell@nlrb.gov

Matthew J. Turner, Counsel for the General Counsel
National Labor Relations Board, Region 10
233 Peachtree Street NE
1000 Harris Tower
Atlanta, Georgia 30303
Email: matthew.turner@nlrb.gov

Kimani Adams
345 Twin Lakes Drive
Gray, Georgia 31032-5033
Email: kimani.adams01@gmail.com

s/ K. Bryance Metheny
OF COUNSEL